

SELOGA JAYA SDN. BHD.

v.

PEMBENAAN KENG TING
(SABAH) SDN. BHD.

SUPREME COURT, IPOH
TUN DATO' SERI HAJI ABDUL
HAMID BIN HAJI OMAR LP,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATO' MOHAMED DZAIDDIN BIN
HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-542-1992]
20 APRIL 1994

ARBITRATION: *Application to stay proceedings in Court - Section 6 Arbitration Act 1952 - Whether applicant had taken any steps in the proceedings - Whether filing of affidavits to resist the grant of injunction and appearing in Court amounted to taking "steps in the proceedings" within the meaning of s. 6 of the Act.*

ARBITRATION: *Application to stay proceedings in Court - Section 6 Arbitration Act 1952 - Whether applicant ready and willing to do all things necessary to the proper conduct of arbitration - Onus of proof thereof.*

PRACTICE & PROCEDURE: *Discretionary order of Registrar - Appeal to Judge in Chambers - Appeal by way of re-hearing - Whether Judge to exercise discretion as if the matter came before him for the first time.*

PRACTICE & PROCEDURE: *Discretionary order of Registrar - Appeal to Judge in Chambers - Decision of Registrar only a simple ipse dixit - Whether any weight to be given to decision - Whether Judge to exercise independent discretion of his own.*

PRACTICE & PROCEDURE: *Appeal against discretionary order of Registrar to Judge in Chambers - Further appeal to Supreme Court - Materials to be reviewed by Supreme Court - Whether Supreme Court ought to review only the Judge's exercise of discretion.*

By a contract in writing dated 17 January 1991 the appellant and the respondent entered into an agreement wherefore construction of a project known as Kerja Pembinaan Awam in Kubong, Labuan, which had been contracted to the appellant by the Ministry of Defence, was sub-contracted to the respondent by the appellant. The respondent subsequently commenced works on the project and took charge of the project site.

- a* Construction was however delayed and there were complaints by the Government that the works were defective. In purported response thereto, the appellant, as the main contractor, gave the respondent notice on 6 November 1991 highlighting the defaults and requesting remedy thereof within seven days failing which the agreement would be terminated. The notice was not complied with and on 13 November 1991 the agreement was determined by the appellant.
- b*

The respondent thereupon issued a writ of summons on 21 November 1991 claiming, *inter alia*, for a declaration that the notice of termination was invalid. On the same day, the respondent also applied for and obtained an ex-parte interlocutory injunction restraining the appellant from prohibiting the respondent from entering the project site.

- c*
- d* On 28 November 1991 the appellant entered a conditional appearance and applied by summons under s. 6 Arbitration Act 1952 for a stay of the proceedings on the ground that the respondent's claim should be arbitrated. Affidavits opposing the grant of the injunction were also filed and in one of them the appellant asserted that it was "ready to do all things requisite to enable all the matters in dispute aforesaid to be determined by arbitration in accordance with the provisions of the agreement". The injunction was however dissolved on 2 January 1992 by consent of the parties. In the meanwhile, on 3 December 1991, the appellant appeared before Anuar J and took a preliminary objection challenging the jurisdiction of the Court but the same was over-ruled by the learned Judge.
- e*
- f*

On 27 March 1992 the Registrar heard and dismissed the appellant's application for stay. The appellant appealed to the Judicial Commissioner in Chambers who again dismissed the application. In his judgment the Judicial Commissioner ruled, *inter alia*:

- g*
- h*
- i*
- (1) That the Registrar, in dismissing the appellant's application for stay, had exercised her discretion properly and judiciously and therefore there was no ground to disturb her finding.
 - (2) That the correspondence between the parties had not shown any intention on their part to arbitrate the dispute and that the appellant had failed to show that at all material times it was ready and willing to

do all things necessary for the proper conduct of the arbitration.

- (3) That since the application for stay was made only after the unsuccessful attempt before Anuar J to set aside the injunction, the application was not made *bona fide* and was calculated only to obtain delay.
- (4) That before applying for stay under s. 6 of the Arbitration Act 1952 the appellant had taken "a step in the proceedings" when it filed an affidavit to set aside the injunction and attended the hearing before Anuar J to challenge the jurisdiction of the Court, and had thereby affirmed its willingness to be bound by the Court proceedings.

Hence, the further appeal by the appellant.

Held:

[1] It is clear law that for the grant of a stay, the applicant herein must demonstrate to the Court by affidavit evidence that both at the time when proceedings were commenced and to the time when the exercise of the Court's discretion is sought for the grant of a stay, that he is ready and willing to do all things necessary for the proper conduct of the arbitration. On the other hand, the onus on the respondent is to satisfy the Court, not so much that he has a right to continue, but that he ought to be allowed to continue the action. It goes without saying that the discretion reposed in the Court is a judicial one to be exercised having regard to the particular circumstances of each case.

[2] Although the Judge in Chambers entertaining an appeal from a discretionary order of the Registrar is entitled to give the Registrar's decision the weight it deserves, the rule remains that the Judge ought to exercise his discretion as though the matter comes before him for the first time particularly when, as here, the appeal came to him in the form of a re-hearing of the application. It is also settled law that in exercising his discretion thus, the Judge is not fettered in any way by the earlier exercise of the Registrar's discretion.

[3] As the Registrar in the instant case gave no judgment but only a bare decision or a simple *ipse dixit*, the decision deserved no weight at all and the Judge was wrong in giving weight to such decision of the Registrar. In view particularly of the fact that the Judge himself accepted, correctly, that the appeal before him was by way of an actual re-hearing, the Judge was also wrong in taking the approach that he should not

a interfere with the Registrar's exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or that there had been a miscarriage of justice. In the circumstances of this case the Judge ought to have exercised an independent discretion of his own and not to defer to the Registrar's exercise of his discretion. This must be the proper approach to adopt as, in the event of a further appeal from the Judge to the Supreme Court, it is the Judge's order and not the Registrar's that is material and subject to review.

c [4] The Judge was wrong in taking the view that the appellant was not willing to arbitrate the dispute or that the contemporary correspondence between the parties had not shown a desire to refer the dispute to arbitration. The appellant had deposed in his affidavit dated 28 November 1991 that he "was ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said agreement" and this assertion was never contradicted by the respondent. The Judge, in holding that such a deposition was insufficient, had clearly failed to recognise that at such an early stage, there is little the appellant was obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator. The Judge had further failed to recognise that the appellant had virtually no opportunity to raise the arbitration clause by way of correspondence before the issue of writ. On the facts, the Judge ought to have ruled that the appellant was at all material times ready and willing to do all things necessary to the proper conduct of the arbitration.

f [5] The view adopted by the Judge that the filing of the affidavits by the appellant seeking discharge of the interlocutory injunction and the taking of the preliminary objection before Anuar J constituted "a step in the proceedings" is untenable. Resisting an application for an interlocutory injunction by putting in evidence and appearing in Court in the circumstances of this case cannot be taken as "a step in the proceedings". The conduct of the appellant did not in any way indicate an election to abandon its right to a stay and nor did it have the effect of invoking the jurisdiction of the Court. The appellant had thus not taken a step in the proceedings.

g [6] The Judge had misread the record when he observed that the appellant had resorted to the

provision of s. 6 of the Act with a view to stay the proceedings only after having failed to set aside the injunction before Anuar J. The chronology of events showed just the reverse as it was only after applying for a stay that the appellant filed the various affidavits opposing the grant of injunction and challenging the jurisdiction of the Court before Anuar J. In the circumstances there was no lack of diligence on the part of the appellant in invoking the arbitration clause and there was likewise no basis for the proposition that the application for a stay under s. 6 of the Act was not made *bona fide*.

[7] Even if a party can satisfy the Court on the conditions for the grant of a stay under s. 6 of the Act, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the Court still retains a discretion to refuse it. Accordingly, although the appellant had satisfied all the requirements for a stay, the Court must go on to consider whether in the circumstances of the case it is proper to reverse the discretion of the Judge.

[8] Having examined afresh the background to this dispute and the course which the proceedings have taken, it is clear that apart from the misdirection in law by the Judge in his approach to the Registrar's decision, the exercise of the discretion by the Judge in refusing stay was not justified on the facts. Be that as it may, An arbitrator with the necessary expertise is better able to deal with the issues that will arise for decision, which would mainly be issues of fact, than a Judge.

[Appeal allowed. Order of the High Court varied accordingly].

[Bahasa Malaysia Translation of Headnote]

TIMBANGTARA: *Permohonan untuk menggantung prosiding dalam Mahkamah - Seksyen 6 Akta Timbangtara 1952 - Sama ada pemohon ada mengambil sebarang langkah dalam prosiding tersebut - Sama ada pemfailan affidavit untuk menghalang pemberian injuksi dan hadir di Mahkamah terjumlah kepada "langkah-langkah dalam prosiding" dalam lingkungan maksud s. 6 Akta tersebut.*

TIMBANGTARA: *Permohonan untuk menggantung prosiding dalam Mahkamah - Seksyen 6 Akta Timbangtara 1952 - Sama ada pemohon bersedia dan sanggup menjalankan segalayang perlubagi mengadakan timbangtara yang sempurna - Beban membuktikan keatasnya.*

a **AMALAN & PROSEDUR:** *Perintah budibicara Pendaftar-Rayuan kepada Hakim dalam Kamar - Rayuan melalui perbicaraan semula - Sama ada Hakim patut mengamalkan budibicara seolah-olah perkara tersebut dibawa ke hadapan beliau buat kali pertama.*

b **AMALAN & PROSEDUR:** *Perintah budibicara Pendaftar-Rayuan kepada Hakim dalam Kamar - Keputusan Pendaftar hanya merupakan suatu ipse dixit - Sama ada perlu diberi pertimbangan kepada keputusan tersebut - Sama ada Hakim patut mengamalkan budibicara beliau yang tersendiri.*

c **AMALAN & PROSEDUR:** *Rayuan kepada Hakim dalam Kamar terhadap perintah budibicara Pendaftar - Rayuan lanjutan kepada Mahkamah Agung - Material dikaji oleh Mahkamah Agung - Sama ada Mahkamah Agung hanya patut mengkaji amalan budibicara Hakim.*

d Melalui satu kontrak bertulis bertarikh 17 Januari 1991 perayu dan responden telah menandatangani satu perjanjian di mana pembinaan sebuah projek yang dikenali sebagai Kerja Pembinaan Awam di Kubong, Labuan, yang mana dikontrakkan kepada perayu oleh Kementerian Pertahanan, telah kemudiannya disubkontrakkan kepada responden oleh perayu. Responden kemudiannya memulakan kerja ke atas projek tersebut dan mengambil alih tugas di tapak kerja.

e Walau bagaimanapun kerja-kerja pembinaan telah terlewat dan Kerajaan membuat aduan bahawa kerja-kerja tersebut tidak sempurna. Sebagai apa yang dikatakan jawapan kepada aduan tersebut, perayu selaku kontraktor utama, memberikan notis kepada responden pada 6 November 1991 memaklumkan mengenai ketidaksempurnaan tersebut dan meminta supaya ianya dibetulkan dalam masa tujuh hari. Sekiranya gagal, perjanjian tersebut akan ditamatkan. Notis tersebut tidak dipatuhi dan pada 13 November 1991 perjanjian berkenaan telah ditamatkan oleh perayu.

f Responden kemudiannya mengeluarkan writ saman pada 21 November 1991 menuntut antara lain, untuk suatu perisytiharan bahawa notis penamatan adalah tidak sah. Pada hari yang sama, responden juga telah memohon dan memperolehi satu injuksi *interlokutori ex-parte* yang menghalang perayu daripada menahan responden untuk memasuki tapak projek tersebut.

g Pada 28 November 1991 perayu telah memasukkan kehadiran bersyarat dan

memohon melalui saman di bawah s. 6 Akta Timbangtara 1952 untuk penggantungan prosiding atas alasan bahawa tuntutan responden harus ditimbangtarakan. Affidavit yang menentang pemberian injuksi telah juga difailkan dan dalam salah satunya perayu menegaskan bahawa beliau "bersedia untuk melakukan segala apa yang dikehendaki bagi membolehkan segala perkara yang dipertikaikan diputuskan melalui timbangtara menurut peruntukan perjanjian berkenaan". Walau bagaimanapun injuksi tersebut dibubarkan pada 2 Januari 1992 dengan persetujuan pihak-pihak tersebut. Sementara itu, pada 3 Disember 1991, perayu telah hadir di hadapan Hakim Anuar dan membuat bantahan permulaan mencabar bidang kuasa Mahkamah, tetapi ianya telah tidak dibenarkan oleh Hakim yang bijaksana tersebut.

Pada 27 Mac 1992 Pendaftar telah mendengar dan menolak permohonan perayu bagi penggantungan. Perayu membuat rayuan kepada Pesuruhjaya Kehakiman dalam Kamar yang juga telah menolak permohonan tersebut. Dalam penghakiman, Pesuruhjaya Kehakiman memutuskan, antara lain:

1. Bahawa Pendaftar, dalam menolak permohonan perayu untuk penggantungan, telah menjalankan budibicara beliau dengan wajar dan dengan bijaknya dan oleh yang demikian tiada alasan untuk mengubah kedapatannya itu.
2. Bahawa koresponden di antara pihak-pihak tersebut tidak menunjukkan sebarang niat dipihak mereka untuk menimbangtara pertikaian tersebut dan perayu telah gagal untuk menunjukkan bahawa pada setiap masa yang berkenaan beliau adalah bersedia dan sanggup menjalankan segala yang perlu untuk timbangtara yang sewajarnya.
3. Bahawa memandangkan permohonan untuk penggantungan hanya dibuat selepas tidak berjaya untuk mengeneipkan injuksi di hadapan Hakim Anuar, permohonan tersebut tidak dibuat *bona fide* dan hanya dihitung sebagai untuk suatu kelengahan.
4. Bahawa sebelum memohon untuk penggantungan di bawah s. 6 Akta Timbangtara 1952, perayu telah mengambil "suatu usaha dalam prosiding" apabila ia menfailkan satu affidavit untuk mengeneipkan injuksi tersebut dan menghadiri perbicaraan di hadapan Hakim

a Anuar untuk mencabar bidang kuasa Mahkamah, dan dengan itu mengesahkan kesediaannya untuk terikat kepada prosiding Mahkamah.

Maka, perayu pun membuat rayuan selanjutnya.

b **Diputuskan:**

c [1] Undang-undang jelas bahawa untuk pemberian penggantungan, pemohon dalam tindakan ini mestilah menunjukkan kepada Mahkamah melalui affidavit keterangan bahawa pada waktu prosiding tersebut dimulakan dan hingga waktu di mana pengamalan budibicara Mahkamah dipohon untuk pemberian penggantungan, bahawa beliau bersedia dan sanggup menjalankan segala perkara yang perlu untuk mengadakan timbangtara yang sempurna. Sebaliknya, beban ke atas responden ialah untuk memuaskan Mahkamah, bukan sangat mengenai hak beliau untuk meneruskan, *d* tetapi beliau patut dibenarkan untuk meneruskan tindakan tersebut. Tidak perlu diperkatakan bahawa budibicara yang terdapat dalam Mahkamah merupakan sesuatu yang tidak berat sebelah yang perlu diamalkan dengan mengambil kira keadaan-keadaan tertentu setiap kes.

e [2] Walaupun Hakim dalam Kamar yang mendengar rayuan daripada perintah budibicara Pendaftar berhak untuk memberikan pertimbangan yang sepatutnya ke atas keputusan Pendaftar, undang-undangnya tetap kekal bahawa Hakim haruslah mengamalkan budibicaranya seolah-olah perkara tersebut dibawa ke hadapan beliau buat pertama kalinya terutama sekali apabila, sebagaimana di sini, rayuan tersebut dibawa kepada beliau dalam bentuk perbicaraan semula akan permohonan tersebut. Juga telah termaktub dalam undang-undang bahawa dalam menjalankan budibicara beliau, Hakim berkenaan tidak dibelenggu dalam apa cara jua oleh amalan awal akan budibicara oleh Pendaftar.

g [3] Memandangkan Pendaftar dalam kes ini tidak memberikan sebarang penghakiman tetapi hanya suatu keputusan yang biasa atau *ipse dixit* yang mudah, keputusan tersebut tidak perlu dipertimbangkan langsung dan Hakim berkenaan adalah tersilap dalam menimbangkan keputusan Pendaftar itu. Terutama sekali melihatkan kepada fakta bahawa Hakim itu sendiri menerima dengan *h* betulnya bahawa rayuan yang dibawa ke *i*

hadapan beliau adalah melalui perbicaraan semula yang sebenar. Hakim itu juga adalah salah dalam mengambil pendekatan yang beliau tidak harus campurtangan dalam amalan budibicara oleh Pendaftar melainkan ditunjukkan bahawa budibicara tersebut telah diamalkan atas prinsip yang salah atau bahawa terdapat salah laksana keadilan. Dalam keadaan kes ini, Hakim berkenaan sepatutnya mengamalkan budibicara beliau sendiri dan tidak menurut amalan budibicara Pendaftar. Inilah yang merupakan pendekatan yang sepatutnya diambil memandangkan, jika terdapat rayuan lanjutan dari Hakim kepada Mahkamah Agung, maka perintah Hakim dan bukannya Pendaftar yang diambil kira dan tertakluk kepada semakan semula.

[4] Hakim berkenaan adalah salah dalam berpendapat bahawa perayu tidak mampu untuk menimbangtara pertikaian tersebut atau koresponden semasa di antara pihak-pihak tersebut tidak menunjukkan niat untuk merujuk pertikaian tersebut kepada timbangtara. Dalam afidavitnya yang bertarikh 28 November 1991, perayu mendeposkan bahawa beliau "bersedia dan sanggup untuk melakukan segala apa yang dikehendaki bagi membolehkan segala perkara yang dipertikaikan diputuskan melalui timbangtara menurut peruntukan perjanjian berkenaan" dan penegasan ini tidak pernah disangkal oleh responden. Hakim berkenaan, dalam memutuskan bahawa deposisi sedemikian adalah tidak cukup, telah gagal untuk melihat bahawa pada peringkat yang sebegini awal, perayu tidak dapat berbuat apa-apa selain daripada mengemukakan kesanggupan untuk melantik seorang penimbangtara. Seterusnya Hakim berkenaan gagal untuk melihat bahawa perayu tidak mempunyai apa-apa peluang langsung untuk membangkitkan klausa timbangtara melalui koresponden sebelum writ dikeluarkan. Diatas fakta, Hakim tersebut sepatutnya memutuskan bahawa perayu adalah pada setiap masa yang berkenaan bersedia dan sanggup untuk melakukan segala apa yang perlu untuk mengadakan timbangtara yang sewajarnya.

[5] Pendapat yang diterimapakai oleh Hakim berkenaan bahawa pemfailan afidavit oleh perayu yang memohon pelepasan injuksi interlokutori dan bantahan permulaan yang dibuat di hadapan Hakim Anuar merupakan "suatu langkah dalam prosiding" tidak boleh dipertahankan. Menolak permohonan untuk

a injuksi interlokutori dengan mengemukakan keterangan dan hadir di Mahkamah dalam keadaan kes ini tidak boleh diambil sebagai "suatu langkah dalam prosiding". Perlakuan perayu tidak dalam apa cara jua menunjukkan suatu pilihan untuk mengeneipkan haknya bagi satu penggantungan dan juga tidak mempunyai kesan penggunaan bidang kuasa Mahkamah. Maka perayu tidak mengambil sebarang langkah dalam prosiding tersebut.

[6] Hakim tersebut telah tersilap baca rekod berkenaan apabila beliau mendapati yang perayu telah menggunakan prosiding tersebut hanya setelah gagal untuk mengeneipkan injuksi yang dibawa ke hadapan Hakim Anuar. Kronologi peristiwa menunjukkan sebaliknya di mana, hanya setelah memohon untuk penggantungan, baru perayu memfailkan beberapa afidavit menentang pemberian injuksi dan mencabar bidang kuasa Mahkamah di hadapan Hakim Anuar. Dalam hal ini tiada sebarang kekurangan kerajinan dipihak perayu dalam menggunakan klausa timbangtara dan begitu juga tiada sebarang asas untuk dicadangkan bahawa permohonan bagi penggantungan di bawah s. 6 Akta tersebut tidak dibuat *bona fide*.

[7] Jika sekalipun satu pihak dapat memuaskan Mahkamah berhubung dengan syarat-syarat bagi pemberian penggantungan di bawah s. 6 Akta tersebut, ia tidaklah *ipso facto* mengikut bahawa beliau akan berhak, sebagai haknya kepada satu penggantungan, memandangkan Mahkamah masih lagi memiliki budibicara untuk menolaknya. Begitu juga, walaupun perayu telah memenuhi segala syarat untuk penggantungan, Mahkamah mestilah meneruskan untuk menimbangtara sama ada dalam keadaan kes ini adalah wajar untuk menarik balik budibicara Hakim.

[8] Setelah mengkaji latarbelakang pertikaian ini dan jalan yang telah diikuti oleh prosiding berkenaan, adalah jelas bahawa selain daripada salah arah dari segi undang-undang oleh Hakim berkenaan dalam pendekatannya kepada keputusan Pendaftar, amalan budibicara oleh Hakim berkenaan dalam mengeneipkan penggantungan atas fakta yang wujud tidaklah berjustifikasi. Jika begitulah keadaannya, maka seorang Penimbangtara yang memiliki kepakaran yang diperlukan akan dapat berurusan dengan lebih baik berhubung dengan isu-isu yang berbangkit, untuk keputusan, di

mana isunya ialah mengenai isu fakta, **a**
berbanding dengan seorang Hakim.

[Rayuan dibenarkan. Perintah Mahkamah
diubah dengan sewajarnya]

Cases referred to:

Dooley v. The London Assurance [1872] 6 ILT 31 (**dist**)
Perbadanan Kemajuan Negeri Perak v. Asean Security
Paper Mill Sdn Bhd [1991] 3 CLJ 2400 (**refd**) **b**

Evans v. Bartlam [1937] AC 473 (**folll**)

Blundell v. Rimmer [1971] 1 All ER 1072 (**refd**)

Herbs and Spices Trading Post Pte Ltd v. Deo Silver
(Pte) Ltd [1991] 2 MLJ 311 (**refd**)

Piercy v. Young [1879] 14 Ch D 200, 209 (**cit**)

Phoenix v. Pope [1974] 1 AER 512 (**cit**) **c**

Russel-Uclaf v. Searle [1978] 1 Lloyd's Report
225 (**refd**)

Zalinoff v. Hammond [1898] 2 Ch. 92 (**cit**)

Pitchers Ltd. v. Plaza (Queensbury) Ltd. [1940] 1 AER
151 (**cit**)

Wickham v. Harding [1859] 28 LJ Ex 215 (**refd**)

Heyman v. Darwins Ltd [1942] AC 356 (**refd**) **d**

The Eleftheria [1969] 1 Lloyd's Report 237 (**refd**)

Legislation referred to:

Arbitration Act 1952, s. 6

Common Law Procedure Amendment Act 1856, s. 14

Other sources referred to:

Atkins Court Forms, 2nd Edn., Vol. 6 1989 Issue

Halsbury's Laws, 4th Edn., p. 493 para 656

For the appellant - Vinayak Prathan (Chee Yok Yung
with him); M/s Sheik Shatar, Cheah, Tan & Lee

For the respondent - G. Sri Ram (Philip Chong with
him); M/s Philip Chong & Co.

JUDGMENT

Edgar Joseph Jr SCJ:

This is an appeal from the judgment of Mr
Judicial Commissioner Ee Chin Seng ("the
Judge") dismissing an appeal from the decision
of the Senior Assistant Registrar ("the
Registrar") refusing an application for stay of an
action commenced by the appellant ("the Con-
tractor") against the respondent ("the Sub-
Contractor") under s. 6 of the Arbitration Act
1952, ("the Act"), which provides:

If any party to an arbitration agreement or
any person claiming through or under him
commences any legal proceedings against
any other party to the arbitration, or any per-
son claiming through or under him, in respect
of any matter agreed to be referred to arbitra-
tion, any party to the legal proceedings may,
before taking any other steps in the proceed-
ings, apply to the Court to stay the proceedings,
and the Court, if satisfied that there is no

sufficient reason why the matter should not be
referred in accordance with the arbitration
agreement, and that the applicant was at the
time when the proceedings were commenced
and still remains ready and willing to do all
things necessary to the proper conduct of the
arbitration, may make the order staying the
proceedings.

The facts underlying this appeal may be shortly
stated. The Contractor had been appointed by
the Ministry of Defence, of the Government of
Malaysia, to carry out certain development works
in respect of a project known as Kerja Pembinaan
Awam in Kubong, Labuan, ("the Project") and,
pursuant thereto, a contract in writing dated 23
November 1990 was entered into by the Con-
tractor and the Ministry of Defence ("the Main
Contract").

By a contract in writing entered into by the
Contractor and the Sub-contractor dated 17
January 1991 ("the Sub-contract"), the Con-
tractor had appointed the Sub-contractor to manage
and complete the overall construction of the
project in accordance with the stipulations,
provisions and conditions set out in the Main
Contract.

e Pursuant to the Sub-contract, the Sub-con-
tractor had carried out construction works and had
delivered materials on site in respect of which
three interim certificates had been issued by the
Consultant Engineer. The Contractor paid the
Sub-contractor 95% of the amounts certified
under the first and the second interim certifi-
cates while monies due under the third interim
certificate were paid into a joint account by the
Contractor on 14 November 1991 and with-
drawn some four days later.

f However, as events turned out, construction
was delayed and there were complaints by the
Government that the works were also defective.
g The Sub-contractor whilst admitting that the
works were delayed, denied that it was respon-
sible for the delays or that the works were
defective.

h In the upshot, by a letter dated 26 October 1991,
the Contractor gave the Sub-contractor formal
notice that it was in default of the provisions of
s. 3.01(3)(a) to (h) of Article III of the Sub-
contract, made reference to s. 5.02 of Article V,
and required the Sub-contractor to remedy the
defaults, within seven days from date of receipt
thereof, failing which, the Contractor would
i determine the Sub-contractor's employment.

The Contractor then by a letter dated 13 November 1991 alleged non-compliance and purported to determine the Sub-contractor's employment under the Sub-contract.

Next, the Contractor had then sought to take possession of the site but this was resisted by the Sub-contractor.

Then, on 21 November 1991, the Sub-contractor, without further ado, caused to be issued the writ of summons herein claiming a declaration that the notice of termination of the Sub-contract was invalid, that the Sub-contract was still subsisting and praying for specific performance and unspecified damages for breach of contract.

It was alleged by the Contractor and not challenged by the Sub-contractor, that prior to the issue of the writ of summons, no claim had been made by the Sub-contractor against the Contractor.

On the same day that the writ of summons was issued, the Sub-contractor had applied for and obtained an *ex parte* interlocutory injunction restraining the Contractor from prohibiting the Sub-contractor from entering the project site.

On 28 November 1991, the Contractor entered a conditional appearance and applied by summons for a stay of the proceedings under s. 6 of the Act.

Thereafter, the Contractor filed a number of affidavits opposing the grant of the injunction.

Before Anuar J., on 3 December 1991, the Contractor took a preliminary objection challenging the jurisdiction of the Court to grant the injunction but this was over-ruled. However, on 2 January 1992, by consent of parties the injunction was dissolved.

On 27 March 1992, the Registrar heard and dismissed the Contractor's application for stay under s. 6 of the Act, from which it appealed to the Judge in chambers.

The grounds on which the Judge dismissed the application were fourfold and may be stated thus:

- (a) due weight had to be given to the decision of the Registrar who, in refusing the application, had exercised her discretion. Though, this did not mean that the decision of the Registrar was in any way binding on the Court, it deserved consideration and

a acceptance, if such exercise of discretion was correct and based on judicious and judicial principle.

- (b) although the Court is inclined to give effect to the wishes of the parties as they appear in the arbitration clause, it was for the Contractor, to demonstrate to the Court, that at all material times, it was ready and willing to do all things necessary for the proper conduct of the arbitration; this was a condition precedent. There was an absence of such evidence *ante litem motam*.

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- (c) the Contractor's application for stay was made too late in the day and not *bona fide* considering that it was made only after its unsuccessful attempt before Anuar J. to set aside the injunction. The Judge thought that the Contractor's application for stay was motivated by a desire to obtain delay. The authority to which he referred was *Dooley v. The London Assurance* [1872] 6 ILT 31, in which Pigot, C.B. when speaking for the Court with reference to an application by a party claiming that proceedings should be stayed under s. 14 of the Common Law Procedure Amendment Act 1856, because there was an arbitration agreement in force said this (at p. 33):

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It appears to me that this contract is one which ought to be effectuated within all legitimate limitations; but the provision which we have to administer is one which requires to be carefully scanned and considered, with reference to the conduct of the party who seeks to avail himself of it. It may be made the engine of delay, and I think it very important with a view to speed, that parties who are entitled under a contract, to which a condition of the present character is attached, and who are desirous of taking advantage of that provision, should intimate that desire to the opposite party at the earliest possible moment, in the ordinary course of business.

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- (d) the Contractor had, before applying for a stay under s. 6 of the Act, taken "a step in the proceedings" and had thereby affirmed the correctness of the proceedings and its willingness to be bound by the Court proceedings.

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In particular, said the Judge, the Contractor had not merely filed an affidavit to set aside the injunction but also, Counsel on its

behalf, had attended the hearing before Anuar J. and taken a preliminary objection challenging the jurisdiction of the Court, though the same was over-ruled.

We shall now turn to consider, *seriatim*, the four separate grounds advanced by the Judge for refusing the Contractor's application for a stay under s. 6 of the Act.

As to (a): What weight should the Judge have accorded to the decision of the Registrar?

With reference to the decision of the Registrar refusing the Contractor's application for a stay, the Judge said this:

Whatever it is due weight should be given to the decision of the learned SAR who had exercised his or her discretion in refusing the order of stay. Such view can be found in the cited case of *Evan v. Bartham* and *Kiu May Construction*, High Court, Hong Kong. This is to say in my view, though such decision of SAR is definitely not binding on this Court, it deserves this Court's consideration and acceptance if such exercise of discretion is correct based on judicious and judicial principle. No evidence to show otherwise in our present case to warrant a total disregard of that decision.

And, two pages later, after referring to the principles enunciated in the Supreme Court decision of *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400 with regard to arbitration clauses under s. 6 of the Act, the Judge said this:

In the light of the above enunciated principles I am of the considered view that the learned SAR had exercised proper and judicious discretion based on the settled principle of laws to refuse the stay of proceedings in the High Court, Kuala Lumpur, to refer dispute to the arbitration tribunal for determination.

Now, in *Evans v. Bartlam* [1937] AC 473, H.L. Lord Atkin said this (at p. 478):

The power to set aside a judgment obtained on default of appearance is given to the Court or a Judge under RSC Order XIII, r. 10, and a similar power extending to judgments by default under any rule is given by RSC O. XXVII, r. 15. It is a power entrusted to the discretion of the Court or Judge, and by RSC Order LIV, r. 12, the master is given jurisdiction to exercise the discretion. As to the limits of the discretion, if any, it may be necessary to say a word or two later. I stay only to mention a contention of the respondent that, the master

having exercised his discretion, the Judge in chambers should not reverse him unless it was made evident that the master had exercised his discretion on wrong principles. I wish to state my conviction that, where there is a discretionary jurisdiction given to the Court or a Judge, the Judge in chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights, and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper v. Cooper* [1936] WN 205, with which I entirely agree.

Two things are plain from the above passage in the judgment of Lord Atkin; namely:

- (1) in an appeal from a discretionary order of the Master (equivalent here to a Senior Assistant Registrar) to a Judge in chambers, the Judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the Master's discretion, and
- (2) so far as the Master's decision is concerned, the Judge will give it **the weight it deserves**.

In *Blundell v. Rimmer* [1971] 1 All ER 1072, Payne J. when considering an appeal from an order of the district registrar giving leave to sign interlocutory judgment in an action for negligence had occasion to refer to Lord Atkin's speech in *Evans v. Bartlam* in these terms:

I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by Counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a re-hearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord

Atkin in *Evans v. Barlam* and in the notes in the **Supreme Court Practice 1970**, Vol 1, p. 759, para 58/1/2, p. 762, para 58/4/1, under RSC O. 58, rr. 1 and 4.

In the Singapore High Court case of *Herbs and Spices Trading Post Pte Ltd v. Deo Silver (Pte) Ltd* [1991] 2 MLJ 311, a similar point was made by Chan Sek Keong, J. in these terms (at p. 313 col 2 C & E):

The situation in O. 55 is analogous to 'appeals' from the decisions of the registrar of the High Court to the judge-in-chambers. In such appeals, the Judge-in-Chambers is not exercising 'appellate' jurisdiction in the same sense when it hears appeals from the district Court. This view is consistent with the rule that an appeal from the registrar of the High Court to the Judge-in-Chambers is by way of an actual re-hearing of the application and the Judge treats the matter afresh as though it came before him the first time...

With Lord Atkin's observations in mind, the first point we should like to make is that since the Registrar gave no judgment but only a bare decision, or in other words, a simple ipse dixit, it deserved no weight at all. Yet, it is obvious that the Judge gave some weight to the decision of the Registrar.

The second point we should like to make is that the Judge did mention, in passing, - in our view quite correctly - that though the matter before him was in form an appeal, it did "take the shape and style of re-hearing ...". However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the Registrar.

In other words, it looks very much as though the Judge's approach was that he should not interfere with the Registrar's exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice. In other words, as an appellate Judge, he was not to exercise an independent discretion of his own, but had to defer to the Registrar's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See 37 **Halsbury's Laws**, 4th Edn., p. 493 para 656). In adopting this approach, the Judge was wrong, the appeal before him being from the Registrar by way of an actual re-hearing.

a Accordingly, in the event of a further appeal from the Judge to the Supreme Court, the substantial discretion is that of the Judge and it is the Judge's order which becomes most material. We are supported in this by the following passage in the judgment of Lord Wright in *Evans v. Bartlam* (*ibid*) at p. 484:

b ... The Master had, in the exercise of his discretion under Order XXVII, r. 15, or Order XIII, r. 10, refused to set aside the judgment. But it is clear that where the Court of Appeal is required to review a discretionary order of a Judge reversing the Master the substantial discretion is that of the Judge, and it is the Judge's order which must particularly be considered by the appellate Court: *Cooper v. Cooper* [1936] WN 205. The Masters admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is properly for the Judge who will no doubt consider carefully the order of the Master. If a further appeal is taken to the Court of Appeal it is the Judge's discretion which that Court has either to support or vary or reverse.

e With respect, Counsel for the Sub-contractor was, therefore, equally wrong in contending before us, as he did in fact contend, that the present appeal, was an appeal against concurrent findings of fact, with all the disadvantages this entails for those who seek to challenge such findings.

f As to (b): Was the Contractor ready and willing to refer the disputes to arbitration?

g It is clear law, scarcely needing any express authority, that for the grant of a stay, the applicant must demonstrate to the Court by affidavit evidence (*Piercy v. Young* [1879] 14 Ch D 200, 209) that both at the time when proceedings were commenced and to the time when the exercise of the Court's discretion is sought for the grant of a stay, that he is ready and willing to do all things necessary to the proper conduct of the arbitration. The onus on the plaintiff is to satisfy the Court, not so much that he has a right to continue, but that he ought to be allowed to continue the action. It goes without saying, that the discretion reposed in the Court is a judicial one to be exercised having regard to the particular circumstances of each case. See *Phoenix v. Pope* [1974] 1 AER 512).

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In the present case, the Contractor's director Chan Nung Wai had deposed by para 6 of his affidavit dated 28 November 1991, filed in support of the summons for stay that:

At the time this action was commenced, I was, and I remain, ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said agreement.

This para was taken straight from **Atkins Court Forms**, 2nd Edn., Vol. 6 1989 Issue. Nowhere in the affidavit in opposition filed on behalf of the Sub-contractor was that assertion contradicted.

However, the Judge took the view that an oath merely affirming that an applicant for a stay is "ready and willing to do all things necessary for the arbitration" is insufficient, and that therefore, as the termination in the present case appeared to have been done with dubious intent, it was for the trial Judge to determine whether the termination of the sub-contract was right or wrongful in subsequent breach of contract proceedings. The Judge also pointed out that although both parties had the benefit of legal advice the contemporary correspondence did not show a desire or intention on the part of the Contractor to refer the disputes to arbitration.

The Judge failed to recognise that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator and this, of course, means that the plaintiff will be hard put to refute the assertion.

As for the point made by the Judge that the contemporary correspondence did not reveal a desire or intention on the part of the Contractor to refer the disputes to arbitration, we need hardly say that the contemporary correspondence would, of course, have to be read having regard to the history of the matter.

With a view to elucidating the issues which arise for decision regarding this part of the case, we must now refer to the contemporary correspondence passing between the parties showing what they say.

The first letter we should like to refer to is the one dated 26 October 1991, from the Contractor to the Sub-contractor threatening termination

a of the Sub-contract and which was as follows:

Dear Sir,

Re: Project Mou-Martello Di Labuan - Package 1 Notice To Remedy Breach Of The Agreement Dated 17 Januari 1991 Between Seloga Jaya Sdn Bhd And Pembinaan Keng Ting (Sabah) Sdn Bhd

b

We hereby notify you that you are in default of all the provisions of s. 3.01(3)(a) to (h) of Article III of the Agreement dated 17 January 1991 made between you and us.

c

In accordance with s. 5.02 of Article V of the said agreement, we hereby require you to remedy all the defaults within seven (7) days of receipt of this notice, failing which we shall without prejudice to any other rights and remedies which we may possess, determine your engagement under the said agreement.

d

Yours faithfully,

Sgd.
Chan Nung Wai
Managing Director

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Upon receipt of that letter, negotiations for a settlement followed, as appears from the solicitors for the Sub-contractor's letter in reply dated 1 November 1991, addressed to the Contractor which was as follows:

Dear Sirs,

Re: Project Mou-Martello Di Labuan

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We refer to your letter dated 26 October 1991 addressed to our client and we have our client's instructions to reply thereto as follows:

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We have been instructed by our client to put on record that they are not in default as alleged in your said letter and therefore your purported notice of termination is improper and invalid.

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Our client's acceptance of your invitation and their attendance at the meeting held on 31 October 1991 at your office was for the purpose of discussing matters relating to the project and is not to be taken or interpreted as an admission of any liability or default on their part.

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Similarly, the subsequent agreement and/or acceptance of any new proposed arrangement or variation of the original terms reached at the meeting is solely for the purpose of mutual benefit pertaining to the project.

Yours faithfully,

Sgd.
(Illegible)

However, the negotiations for settlement were unsuccessful and by the letter dated 13 November 1991, the Contractor served upon the Sub-contractor, a notice of termination of the Sub-contract which was as follows:

Dear Sirs,

Re: Project Mou Martello Di Labuan - Package 1 Determination Of Your Engagement Under The Agreement Dated 17-01-1991

We refer to our notice dated 26 October 1991 requiring you to remedy all the defaults within seven (7) days of receipt of the said notice.

We note that notwithstanding the said notice, you have failed to remedy all the defaults. In accordance with s. 5.02 of Article V of the Agreement dated 17 January 1991 made between you and us, we hereby forthwith determine your engagement under the said agreement and all rights and benefits conferred on you thereunder shall terminate immediately.

We shall be carrying out a valuation of the work done and materials delivered to the site by you shortly and shall inform of the day and time of such valuation, to which you are invited to be present. In the event that we do not suffer any loss expense or damage upon completion of the project, we shall pay the amount, if any, due to you based on such valuation but should we suffer any loss expense or damage in excess of the amount, if any, due to you based on such valuation, we shall claim the difference from you.

Yours faithfully,

Sgd.

Chan Nung Wai
Managing Director

The Sub-contractor, however, did not respond to the notice of termination but instead contested its validity by issuing the writ of summons herein on 21 November 1991 claiming a declaration that the termination was invalid, that the contract was still subsisting and asking for specific performance and unspecified damages for breach of contract. The writ of summons, incidentally, was the first intimation of the Sub-contractor's claim for damages.

The Contractor then attempted to take possession of the site but this was resisted by the Sub-Contractor.

In these circumstances, the Judge ought to have recognised that the Contractor had virtually no

a opportunity to raise the arbitration clause by way of correspondence before the issue of the writ. Thus, the Sub-contractor was in no position to rebut the Contractor's assertion on affidavit, in common form, made on its behalf by its director Chan Nung Wai, that it was, at all material times, ready and willing to arbitrate.

b True it is that the Act contemplates promptitude on the part of those seeking to avail themselves of the arbitration clause. However, in our view, having regard to the chronology of events, the Contractor had clearly complied with this requirement.

c The Judge ought, therefore, to have ruled that the Contractor **was** at all material times ready and willing to do all things necessary to the proper conduct of the arbitration.

d We would go further and say that having regard to the evidence, there is nothing to suggest that the Contractor was invoking the arbitration clause with a view to delaying or frustrating the resolution of the dispute.

e *As to (c): Was there undue delay and/or lack of bona fides on the part of the Contractor in applying for a stay?*

f This ground is intimately connected with ground (b), since, if the applicant for a stay is unable to satisfy the Court that it is not his intention to use the arbitration clause as an engine of delay or indeed to frustrate altogether the resolution of the dispute, then obviously, in practice, it would be impossible for him to show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. Conversely, when, as here, we have found that the Contractor was at all material times so willing and able, the argument based on delay and lack of *bona fides* must lose its sting.

g The history of the proceedings shows quite clearly that it was only **after** applying for a stay that the Contractor filed various affidavits opposing the grant of the injunction and challenging the jurisdiction of the Court to grant the injunction at the hearing before Anuar J. The Judge had, therefore, misread the record when he observed in the penultimate para of his judgment that "After the unsuccessful attempt before the learned Judge Anuar J. to set aside the injunction, the defendant now resorted to the provisions of s. 6 of the Act with a view to stay the proceedings".

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As for *Dooley's* case upon which the Judge relied, it was readily distinguishable on the facts from the present case, because there, unlike here, there was an allegation of fraud which made dispute resolution by arbitration unsuitable. This distinction is made clear in all the three judgments but especially so by Fitzgerald, B. in the last sentence of his judgment where he said this (at p. 34 para 2):

As to why it ought not to be referred, it does appear to me, from what has taken place, that there would seem to have been a disposition to raise a question of fraud, by suggesting that the account given is substantially an untrue representation of the contents of the house, at the time of the fire. I do not think it was the intention of the legislature that such questions should be referred to arbitration under this section.

The Judge ought, therefore, to have ruled that having regard to the chronology of events that there was no lack of diligence on the part of the Contractor in invoking the arbitration clause and that the application for a stay under s. 6 of the Act was made *bona fide*.

As to (d) Had the Contractor taken any step in the action before applying for a stay?

It will be recalled that in the view of the Judge the filing of affidavits by the Contractor seeking discharge of the *ex parte* interlocutory injunction and the taking of the preliminary objection before Anuar J. challenging the jurisdiction of the Court to grant the same was "definitely a step in the proceedings" by the Contractor.

In considering this part of the case, some degree of repetition will be inevitable.

The Sub-contractor had issued his writ on 21 November 1991 and, on the same day, obtained the *ex parte* interlocutory injunction. Exactly one week later, the Contractor entered conditional appearance to the writ and applied to have the proceedings stayed on the ground that the Sub-contractor's claims should be arbitrated. It was only **after** applying for a stay that the Contractor filed a number of affidavits opposing the grant of the injunction.

On 3 December 1991, the Contractor raised preliminary objection challenging the Court's jurisdiction to grant the injunction, but this was over-ruled.

However, on 2 January 1992, the *ex parte* interim injunction was dissolved by consent of parties.

a In *Roussel-Uclaf v. Searle* [1978] 1 Lloyd's Report 225, one of the issues which arose for decision was whether resisting an application for an interlocutory injunction by putting in evidence and appearing in Court was a step.

b In the course of his judgment, Graham J. having referred to *Zalinoff v. Hammond* [1898] 2 Ch. 92 and *Pitchers Ltd. v. Plaza (Queensbury) Ltd* [1940] 1 AER 151 said this at p. 231 col 2 para 3 to p. 232 col 2 para 1:

c ... On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time, as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalise Searle (UK) in that respect. I do not think the present case is covered by the authority of *Pitcher's* case and it seems to me that the reasoning of Mr Justice Stirling in the *Zalinoff* case is more pertinent to the circumstances here where an application for an injunction was being resisted.

d I therefore, hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.

e Before us, perhaps understandably, Counsel for the Sub-contractor, conceded - we think quite correctly - that this particular ground relied upon by the Judge was untenable.

f In our view, regard being had to the circumstances outlined above, the Judge ought to have held that the conduct of the Contractor did not indicate an election to abandon its right to a stay nor did it have the effect of invoking the jurisdiction of the Court and so the Contractor had not taken a step in the proceedings.

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By way of postlude, there are certain general observations we should like to make.

It is well known that if a party can satisfy the Court that the conditions for the grant of a stay under s. 6 of the Act are satisfied, it does not *ipso facto* follow that he will be entitled, as of right, to a stay, for the Court still retains a discretion to refuse it. But, generally, as the Judge rightly recognised, the approach of the Court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft quoted words of Martin B. in *Wickham v. Harding* [1859] 28 LJ Ex 215 "A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so".

Accordingly, although we are satisfied that the Contractor had satisfied all the requirements for a stay, we must go on to consider whether, we should reverse the discretion of the Judge.

Now, it is clear by the law as it was laid down in *Heyman v. Darwins Ltd* [1942] AC 356, that the onus is on a plaintiff to satisfy the Court that it is proper to refuse the application for a stay. Indeed, the case of *The Eleftheria* [1969] 1 Lloyd's Report 237, shows that strong grounds for refusing a stay must be exhibited by a plaintiff.

During the argument, Counsel for the Contractor had pointed out that the primary issue in the present case was whether the termination of the Sub-contract by the Contractor was wrongful and this would involve extensive evidence being adduced on construction practice and custom.

On the other hand, Counsel for the Sub-contractor pointed out that the practical consequences of granting a stay should not be lost sight of. In particular, he referred to the fact that after the application for a stay had been refused, the Sub-contractor had obtained summary judgment in O. 14 proceedings, in respect of which the High Court had heard further argument, and reserved judgment. He argued that the Contractor ought to have, but did not, apply to the Supreme Court for an interim stay of the Judge's order refusing the application for stay under s. 6 of the Act. Therefore, said Counsel, if this appeal were allowed, resulting in a stay under s. 6 of the Act, much judicial time will have been wasted.

In reply, Counsel for the Contractor stressed that the Sub-contractor had commenced the

a O. 14 proceedings as late as 17 January 1993, some thirteen months **after** the Contractor's application for stay under s. 6 of the Act was filed and some nine months **after** the appeal from the Registrar's decision refusing it was dismissed by the Judge. Indeed, the record provided shows that the Contractor's application for stay under s. 6 of the Act was issued as long ago as 28 January 1991. Furthermore, said Counsel, the O. 14 proceedings related to only part of the Sub-contractor's claims so that there would still be other claims under the writ to be considered.

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c We do not consider that the contention of Counsel for the Sub-contractor that were a stay under s. 6 of the Act granted at this stage, much judicial time will have been wasted, should prevail, considering that it was the Sub-contractor who pressed on with the Order 14 proceedings, knowing full well that the present appeal by the Contractor was pending.

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e On the other hand, having examined afresh the background to this dispute and the course which the proceedings have taken, not forgetting the cogent submissions of Counsel on both sides, with a view to examining by way of review, the discretionary aspects of the Judge's order, we are satisfied, that quite apart from the misdirection in law by the Judge in his approach to the Registrar's decision, to which we have referred, that the exercise of the discretion by the Judge in refusing a stay, was not justified on the facts.

f We consider that in this case an arbitrator with the necessary expertise might well be better able to deal with the issues which will arise for decision - and they would be mainly issues of fact - than a Judge.

g In the result, we allow the appeal with costs at all levels, set aside the orders of the Registrar and the Judge, and substitute, in lieu thereof, an order for stay of proceedings under s. 6 of the Act, as prayed for by the Contractor in its summons. Consequently, the order for summary judgment under Order 14 entered in favour of the Sub-contractor against the Contractor hereinbefore mentioned, is set aside as the claims relating thereto, like the rest of the claims, will also have to be referred to arbitration. The deposit paid by way of security for costs must be refunded.

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